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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-766

YODER BROTHERS, INC.,

Petitioner,

v.

CALIFORNIA-FLORIDA PLANT CORPORATION and CALIFORNIA-FLORIDA PLANT CORPORATION OF FLORIDA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Yoder Brothers, Inc., prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on September 7, 1976.

Opinions Below

The Opinion of the Court of Appeals, reported at 537 F.2d 1347, is printed in the Appendix hereto. (1a-125a.) The Judgment Reflecting Decisions of Court and Jury of the District Court of the Southern District of Florida entered on August 28, 1974 is printed in the Appendix hereto. (128a-131a.) The Judgment of the District Court is not reported.

Jurisdiction

The Judgment of the Court of Appeals affirming in part and reversing in part the District Court and directing a new trial on antitrust damages was entered on September 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Is injury to business or property under section 4 of the Clayton Act established in a private antitrust action as a matter of law by a distributor that proves only that the price the distributor charged its customers was illegally high and that the amount of that overcharge was remitted by the distributor to an antitrust violator, particularly where the violator also may be subject to liability for the same overcharges paid by those customers.

2. Have private antitrust claimants proved injury-in-fact under section 4 of the Clayton Act where they remitted certain royalties to a product originator, which sums were collected by them from their customers as a separate item and which royalties admittedly had no effect on the claimants' ability to set their own prices and did not inhibit their sales growth?

3. Does this Court's opinion in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), preclude asserting the passing-on defense to a private antitrust claim in all circumstances other than a cost-plus contract that antedates the claimed violation?

Statutes Involved

Section 1 of the Sherman Act, 26 Stat. 209, 50 Stat. 693, 69 Stat. 282, 88 Stat. 1708, 89 Stat. 801, 15 U.S.C. § 1, as amended, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Statement of the Case

A. The Parties and the Industry

Ornamental plants sold by retail florists and other outlets in the United States typically are grown to maturity from infant plants by greenhouse operators and other growers. The growers purchase the infant plants from concerns specializing in their production and sale. With respect to some ornamentals, such as chrysanthemums, the infant plants are produced by taking cuttings from "mother stock" owned by concerns styled "propagator-distribu-

tors''. Petitioner Yoder Brothers, Inc. (''Yoder'') and respondents California-Florida Plant Corporation (''CFPC'') and California-Florida Plant Corporation of Florida (''CFPCF'')[1] are propagator-distributors.

Yoder is also a breeder of new varieties of ornamental plants. As do other breeders of ornamental plants, Yoder devotes significant efforts and spends considerable sums in developing new varieties.

B. The Controversy

This litigation was commenced in the United States District Court for the Southern District of Florida on March 7, 1973 by petitioner against CFPC and CFPCF for infringement of certain plant patents. CFPCF counterclaimed and in a separate action, later consolidated, CFPC claimed that Yoder, by its participation in certain ''BGA'' and ''GRA'' programs for licensing new non-patented plant varieties, combined to restrain trade in violation of section 1 of the Sherman Act and monopolized the trade in chrysanthemum cuttings in violation of section 2 of the Sherman Act (the ''antitrust counterclaims''). Jurisdiction in the District Court was invoked pursuant to 28 U.S.C. § 1338(a). The subject of this Petition is the Fifth Circuit's holding that Cal-Florida's collection and remission of BGA and GRA royalties established the fact of damage to them as a matter of law.

Although Yoder now patents its new varieties under the plant patent law, 35 U.S.C. § 161, the questions raised by this petition relate to its former practice of licensing propagator-distributors to market the genetic varieties it developed and by obtaining a return for its breeding efforts through collecting ''royalties'' from growers

[1] CFPC and CFPCF are at times referred to collectively as "Cal-Florida".

through propagator-distributors such as CFPC and CFPCF, to whom Yoder made its new plant material available.

Initiated as an incentive to the development of new ornamental plant varieties, the BGA and GRA programs licensed propagator-distributors to sell certain cuttings to growers without any restriction on the price to be charged. The propagator-distributor agreed to pay to BGA and GRA a minimal royalty for each cutting when sold to a customer, but the programs expressly contemplated that Cal-Florida and other propagator-distributors would suffer no out-of-pocket loss since the royalty amount would be paid by the customer. The BGA and GRA programs further provided for a credit if Cal-Florida and other propagator-distributors failed to collect the royalty amount from their customers. 537 F.2d at 1353 (11a). As CFPC informed its customers in a catalog:

> ''BGA varieties are subject to all discounts of Volume, Advance Order and Prompt Payment. The current BGA Royalty is $0.60 per 100 cuttings, rooted or unrooted, and is in addition to the listed base price. BGA Royalties are not subject to Discount or Adjustment of any kind and the total amount of BGA Royalty collected by us is returned to BGA International.
>
> • • •
>
> ''ROYALTY CHARGES. All Royalty Charges (CFPC, BGA, and GRA) will be billed separately and included in the monthly statement.'' 537 F.2d at 1355 (17a-18a).[2]

[2] CFPC employed a practice similar to that of the BGA and GRA agreements: Royalty charges for CFPC varieties were collected by all parties to the CFPC agreements and remitted to CFPC. 537 F.2d at 1355 (15a-16a).

Accordingly, Cal-Florida billed their customers separately for the royalty and, as they stipulated before trial in this case, they remitted to BGA exactly the same amount of royalties they collected from their customers. (133a.) Not a single penny of royalty ultimately came from the pockets of Cal-Florida.

Furthermore, Cal-Florida repeatedly admitted that the BGA and GRA arrangements had no effect on their sales growth or on their ability to set their own prices and thereby determine their own profits. Typical was the testimony by Mr. Neckar, the chief sales officer of CFPC:

> "Q. Are you aware of any respect in which the BGA program inhibited the sales growth of California-Florida in the years which you have been connected with California-Florida? A. No. We were a propagator-distributor for BGA, and I would say it did not inhibit our growth in any way.
>
> • • •
>
> Q. Does the fact that those royalties were charged keep you from raising your price during the time of the BGA program in a way that you might otherwise have wished to raise it? A. No, because royalties were shown on all of our competitor's invoices.
>
> Q. So you charged what you felt was appropriate for your varieties and you would not have charged a different amount even in the absence of BGA? A. No. We charged what we felt was correct.
>
> Q. And then added the royalty as a separate additional item? A. Yes, that is right.
>
> Q. Now, the GRA royalty arrangement worked the same as BGA, did it not, except that your remission of royalties collected was directly to Yoder Brothers rather than BGA? A. Right.
>
> • • •

> Q. Do you feel that the GRA program, in any way, hampered the growth of your cutting volume? A. No.
>
> Q. And, again, since the royalty was charged as a separately stated item for GRA, I take it that the existence of that royalty did not affect your ordinary variety pricing and your volume discounts; is that right? A. That is right.
>
> Q. As in the case of BGA, you charged the price you felt was appropriate, and royalty was added to that? A. That is right." (132a-133a.)

The district court directed a verdict in favor of Yoder on its patent claims and on the monopolization counterclaim. The district court also directed a verdict that Yoder's participation in the BGA and GRA plant variety protection programs constituted a per se violation of section 1 of the Sherman Act. In so doing, it denied Yoder's motions for directed verdicts concerning Cal-Florida's standing to sue under section 4 of the Clayton Act and their failure to present sufficient evidence as to the fact or amount of their antitrust damages. The jury awarded damages to Yoder for patent infringement, and found, in a general verdict, that CFPCF and CFPC each had been damaged in the amount of $64,500 (before trebling) by the BGA and GRA programs. The Fifth Circuit affirmed the judgment of the District Court as to all issues except calculation of damages and remanded for retrial of that issue.

Reasons for Granting the Writ

The Fifth Circuit below committed serious error in its determination as to the fact and amount of damages proved at trial by Cal-Florida. Its unprecedented misinterpreta-

tion of *Hanover Shoe Co.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), to permit a showing of injury whenever an antitrust claimant can show that it overcharged its customers, and the amount of that overcharge, raises the stark spectre that an antitrust violator will be subject to damages to both the middleman and the middleman's customers in the amount of the overcharge.

The issue of whether such a double liability (before trebling) is permissible is already before this Court in *Illinois Brick Co.* v. *State of Illinois,* Docket No. 76-404 (November 8, 1976)—a case involving downstream liability to consumers for an overcharge passed on by a middleman. Certiorari should be granted to review this case brought by a middleman who also seeks recovery measured by the amount of the overcharge to its customers.

Certiorari should be granted for the further reason that the Fifth Circuit's misinterpretation of *Hanover Shoe* negated the term "injury" in section 4 of the Clayton Act enabling private antitrust claimants to sue, notwithstanding the facts that they passed on the overcharge to their customers and that the overcharge admittedly had no effect on their sales growth, their prices or their profits. This result squarely conflicts with this Court's opinion in *Hanover Shoe* and destroys the congressional requirement of injury-in-fact. In so holding, moreover, the Fifth Circuit limited the passing-on defense to situations involving preexisting cost-plus contracts and thereby raised a conflict between it and other circuits.

This Court should review these serious issues of antitrust law and policy. The pendency of *Illinois Brick* and this case provides the Court with the opportunity to make that review in the context of the entire distribution chain. If a middleman who suffered no economic loss is, nevertheless, to be found to have suffered injury and awarded damages identical to those of its customers, this Court should make that determination.

A. The Fifth Circuit's Rule That An Antitrust Claimant Establishes Damages Merely by Proof That It Charged Its Customers Illegally High Prices Is Contrary to the Mandate of Section 4 of the Clayton Act and Raises the Spectre of Double Liability (Before Trebling) for the Same Damage.

This is a case where the alleged overcharge did not affect the profits of the antitrust claimants. Here, that overcharge is said to consist of royalties paid as part of the BGA and GRA licensing programs. As the Fifth Circuit noted in explaining its holding: "We have been careful to describe the overcharge as one affecting Cal-Florida's sales price to *its* customers, rather than as a cost in Cal-Florida's business in the same sense as fertilizer was a cost." 537 F.2d at 1375 n.28 (85a) (emphasis in original). But Cal-Florida admitted that these royalties had not affected its sales growth or its pricing policies. As the Court found:

> "Specific testimony that BGA and GRA did not affect Cal-Florida's prices was common. As mentioned above, Neckar, the Cal-Florida officer in charge of pricing, testified that Cal-Florida charged what it thought was appropriate and that it would not have charged a different amount even in the absence of BGA." 537 F.2d at 1370 (68a).

Noting the evidence was uncontroverted that almost all customer switching was from Yoder to Cal-Florida, 537 F.2d at 1370 (69a), the court also held that Cal-Florida's attempted explanation of any loss of business volume was improbable. 537 F.2d at 1370 n.23 (68a).

The Fifth Circuit thereupon, in effect, adopted a new test of injury—a "presum[ption] that Cal-Florida suffered monetary injury in the precise amount of the BGA and GRA royalties charged on its cutting sales." 537 F.2d at 1372 (75a). Compounding that ruling, the Fifth Circuit proceeded to conclude that the amount of royalties collected by Cal-Florida and paid to BGA and GRA was proper evidence of the amount of damages allegedly suffered by Cal-Florida by reason of the BGA and GRA programs:

> "On remand, the fact-finder must be permitted to consider the full amount of the overcharge—*i.e.* the total amount of royalties paid—as evidence of damages." 537 F.2d at 1376 (89a).

This ruling that an antitrust claimant has suffered injury in the amount of overcharges *to its customers,* even though such overcharges are not proved to have affected the claimant's prices, profits or sales, is error and should be reversed.

1. A Similar Issue of Double Recovery Is Pending Before This Court and a Grant of Certiorari Here Would Enable This Court to Review That Issue in the Context of the Entire Distribution Chain.

This Court recently has granted certiorari to the United States Court of Appeals for the Seventh Circuit to consider that court's decision in *Illinois Brick Co.* v. *State of Illinois,* Supreme Court Docket No. 76-404 (November 8, 1976). There, an indirect purchaser was held to have standing under section 4 of the Clayton Act on the theory that the direct purchaser "passed-on" an illegal overcharge to its customers.

The dichotomy created by the Fifth Circuit's opinion here and *Illinois Brick* arises because of the Fifth Circuit's

holding that proof by a middleman that it overcharged its customers and remitted the amount to an antitrust violator, notwithstanding its failure to prove an effect on its sales, prices or profits, constitutes injury under section 4 of the Clayton Act. To the Fifth Circuit, it is the overcharge that is the injury to the middleman—the same overcharge that the Seventh Circuit held to be the injury to the consumer in *Illinois Brick.* Therefore, if *Illinois Brick* were applied to this case, as it stands after the Fifth Circuit opinion, Yoder could be subjected to having to pay antitrust damages of two times the royalties incident to the BGA and GRA programs.[3] Under the Fifth Circuit holding, Yoder is liable to respondents here. Under *Illinois Brick,* Yoder would be liable for the same injury but to respondents' customers.[4]

Had the Fifth Circuit found that the overcharge had affected Cal-Florida's sales, prices or profits, injury to Cal-Florida separate from that suffered by their customers might have been identified. But the inability to make such a finding, in view of this record, is the point of this case. Cal-Florida suffered no such injury and seeks to recover the royalties for which it was reimbursed.

This dichotomy, arising because the customers—and not respondents—actually paid those royalties, should be addressed by this Court. Not only is it unfair to award damages where there was no true loss, but to permit the Fifth Circuit opinion to stand and consider only *Illinois Brick* would have the effect of permitting those who suffered no net loss to collect damages and, if *Illinois Brick* is reversed,

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[3] After trebling, Yoder would have to pay six times that amount.

[4] In fact, Yoder had been sued by growers alleging damages from payment of BGA and GRA royalties; the case was settled prior to the commencement of the Cal-Florida action. *Nurserymen's Exchange* v. *Yoder Brothers, Inc.,* No. C-70-1510 (N.D. Calif. Dec. 17, 1971).

the effect of denying damages to those who ultimately suffered.

Such a dichotomy will have the further effect of increasing litigation leading to "large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers ...." *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring), *cert. denied sub nom.* 394 U.S. 976 (1969). The concomitant "*in terrorem* increment of the settlement value," *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975), of such litigation needs hardly to be recounted. Nor do the heavy social costs of frustrating unrelated business activity which are incident to major antitrust actions. And here there is no redeeming social value in reimbursing people who suffered no actual net loss. Certiorari should be granted to address these questions.

2. Neither Injury in Fact Nor the Amount of Damage Is Established by Evidence That Middlemen Passed On Illegal Overcharges to Their Customers.

True to the mandate of section 4 of the Clayton Act, which allows an antitrust claimant to recover "threefold the damages *by him sustained*," this Court has affirmed damage awards based on "evidence of the decline in [the claimant's] prices, profits and values ...." *Bigelow* v. *RKO Pictures, Inc.*, 327 U.S. 251, 264 (1946). While a consumer who absorbs an illegal overcharge has been injured in that amount, a middleman who passes on the overcharge has not. The BGA and GRA programs neither affected Cal-Florida's prices, 537 F.2d at 1370 (68a), nor slowed Cal-Florida's growth or caused lost profits, *id.*

Because analysis of "damage measurement . . . must commence with the nature of the antitrust violation itself," Handler, *The Shift from Substantive to Procedural In-*

novation in Antitrust Suits, 71 COLUM. L. REV. 1, 32 (1971), courts have been careful to note that overcharges to customers of the antitrust plaintiff do not measure economic injury. Thus, in *Simpson* v. *Union Oil Co. of California*, 411 F.2d 897 (9th Cir.) *rev'd on other grounds*, 396 U.S. 13 (1969), where the substantive claim concerned, in part, fixing minimum prices, there was no mention of basing damages on the amount of the illegal overcharge. Instead, the court noted that the proper measure of damages was lost profits. 411 F.2d at 909. *See also Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972) (although court allowed instruction on lost profits prior to termination, jury award was based on loss of future profits; no mention of basing damages on the amount by which fixed prices may have exceeded competitive prices); *Peter* v. *Union Oil Co. of Calif.*, 328 F.Supp. 998, 1003 (C.D. Cal. 1971) (damages for resale price maintenance must be based on loss of net profits). Even in the Fifth Circuit, before this action, courts required extensive expert testimony as to the effect on *sales and net profits* that any resale price maintenance agreement may have had on any loss of profits prior to termination. *Greene* v. *General Foods Corp.*, 517 F.2d 635, 660-63 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976) (careful damages computation based on difference in profit margins and depressed sales volume).

The reasons for such a requirement are several. Price differences alone have never been enough to measure damages, simply because "proof of a conspiracy fixing resale prices in the industry might suggest that a plaintiff retailer *benefitted* from the artificially inflated prices." Note, *Private Treble Damage Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 HARV. L. REV. 1566, 1573 (1967) (emphasis added). *Cf. Gray* v. *Shell Oil*

Co., 469 F.2d 742, 749 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973) (in maximum price-fixing conspiracy, desired increase in prices can result in loss of net profits as volume declines); *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969) (retaining rule that, in price discrimination cases, price differential is not measure of damages); Handler, *supra*, 71 COLUM. L. REV. at 32 (in price discrimination cases, plaintiff must show actual loss of customers rather than merely margin of overcharge).

Furthermore, to permit damages on such a theory would enable even an antitrust conspirator, in view of the restriction of the *in pari delicto* defense, *Perma-Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), to join a conspiracy in order to overcharge its customers and then claim injury.[5] The law should not contemplate such a result.

B. The Decision Below, Finding Injury-in-Fact by Use of a Legal Fiction Where the Evidence Establishes the Absence of Such Injury, Is in Direct Conflict With Controlling Decisions of This Court.

In holding that Cal-Florida's remission of BGA and GRA royalties establishes a prima facie case of injury under section 4 of the Clayton Act, the court below further erred, and, in so doing, implicitly rejected the explicit language of section 4 of the Clayton Act and the clear direction of controlling decisions of this Court.

Section 4 of the Clayton Act enables a private antitrust plaintiff "injured in his business or property by reason of anything forbidden in the antitrust laws . . ." to sue for damages due to such violation. Thus, a plaintiff-distributor must show either that an overcharge lowered unit profits or that having to charge their customers higher prices

[5] In the District Court, Cal-Florida admitted to being a co-conspirator with Yoder. (Answers to Interrogatories, 134a-135a.)

caused sales volume to decrease, thereby reducing profits. *See Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

Story Parchment sharply distinguishes the substantial proof of injury-in-fact necessary to satisfy section 4 from the lesser degree of proof permissible to sustain an award of damages. 282 U.S. at 560-62. In *Bigelow*, this Court reviewed a series of prior cases and reaffirmed this distinction, noting that "the evidence of the decline in prices, profits and values" was sufficient to satisfy section 4. 327 U.S. at 264. *See also Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 697-700 (1962).

In addition to employing the unsound presumption discussed page 9, *supra*, the Fifth Circuit erred by misreading *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, *supra*, somehow to change this basic rule by permitting evidence of Cal-Florida's overcharge of their customers to satisfy its burden under section 4. It attempted to justify that holding by reading *Hanover Shoe* to sanction a legal fiction to prove injury upon remission of the overcharge, all the while ignoring the absence of any impact of those royalties on Cal-Florida's "prices, profits and values." *Bigelow* v. *RKO Radio Pictures*, 327 U.S. at 264.

In *Hanover Shoe*, this Court rejected application of the passing-on defense to the facts of that case on the basis that an overcharge to the plaintiff would, in the vast majority of similar cases, affect plaintiff's profits:

> "A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured

after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. *Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued.*" 392 U.S. at 492-93 (emphasis added).

However, this Court also recognized that in certain circumstances where these factors were negated, there would be no injury-in-fact and a passing-on defense would apply:

> "We recognize that there might be situations—*for instance,* when an overcharged buyer has a preexisting 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present." 392 U.S. at 494 (emphasis added).

This availability of the defense was recognized because to deny it in all circumstances would award treble damages to some claimants who suffered no economic loss, contrary to the long established *Story Parchment* principle.

Reading *Bigelow, Story Parchment* and *Hanover Shoe* together thus leaves intact the requirement that a middleman in the distributive chain (such as Cal-Florida) show by a preponderance of the evidence that the higher resale price complained of in fact caused a decrease in profits below that which would have been earned from a larger sales volume with lower unit profits. *See, e.g., Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U.S. at 264; *Computer Statistics, Inc.* v. *Blair,* 418 F.Supp. 1339, 1348 (S.D. Tex. 1976).

Moreover, to hold otherwise, as did the Fifth Circuit, effectively negates the very word "injury" that Congress carefully inserted in section 4 as a prerequisite to a treble damage claim. In the last two terms, this Court forcefully reiterated its concern that the federal courts, in interpreting and enforcing a federal statute, pay particular attention to the words of the statute:

> "The starting place in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 756 (1975) (Powell, J., concurring), *quoted in Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 197 (1976).

Here, the Fifth Circuit ignored the crystal clear language of section 4 of the Clayton Act by permitting a treble damage claim by parties who suffered no economic loss. That violence to the statute is hardly excused by any policy of encouraging private antitrust claims. Although Congress undoubtedly intended to encourage such claims in enacting section 4, it carefully circumscribed them to those brought by injured claimants. As Professor Areeda recently wrote,

> "But the desire to encourage private enforcement and to penalize antitrust violations is no excuse

> for awarding damages that are non-existent, inconsistent with antitrust policy, or unconnected with the true rationale for imposing antitrust liability." Areeda, *Antitrust Violations Without Damage Recoveries,* 89 HARV. L. REV. 1127 (1976).

But that is the error here. Cal-Florida's failure of proof was recognized by the court below in rejecting Cal-Florida's initial theory of damage on the basis of a price differential theory but forgotten in presuming injury-in-fact. One can only surmise that the court somehow misread *Hanover Shoe's* discussion of *Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U.S. 390 (1906), *cited at* 392 U.S. at 489-90, to extend a finding of damages in cases of overcharges to claimants to all allegations of overcharges, even by the claimant to its customers. This apparently is the import of the Fifth Circuit's statement that "[s]imple economics suggests that sales would have increased at lower prices." 537 F.2d at 1375 (87a).

Whatever might be "simple economics," here it is undisputably clear even from the opinion of the Fifth Circuit that Cal-Florida suffered no economic loss. Their prices were set independently of the royalty, and their prices and sales would not have changed absent the royalty. This is the case premised by this Court in *Hanover Shoe* when it preserved the passing-on defense rather than rejecting it *in toto.* In permitting Cal-Florida to claim treble damages due to the royalty, the Fifth Circuit ignored the absence of an effect on their prices or volume and, consequently, their profits. This result goes beyond the permissible bounds of the underlying thesis of *Hanover Shoe* and negates the rationale of *Story Parchment* and *Bigelow.* Certiorari should be granted to correct that error.

C. The Fifth Circuit's Opinion Effectively Precludes Assertion of the Passing-On Defense Even in Circumstances This Court Contemplated Would Be Appropriate in *Hanover Shoe* and, in So Doing, Creates a Conflict Among the Circuits.

While reluctantly stating, *in dictum,* that it recognized the passing-on defense in certain limited circumstances, the Fifth Circuit effectively precluded its application. The court, 537 F.2d at 1375 (85a), *in dictum,* said that a defendant to a private antitrust suit could rebut a presumption of injury by proving that the alleged violation involved a pre-existing cost plus contract or by proving that the overcharge had no effect on the claimant's profits. The court ruled that for Yoder to make such a showing, it had to account for all effects of any and all

> "other economic data, such as the general state of the economy at both times [*i.e.,* both during the term of the violation and either before or after the violation], the entry of a new competitor, or an unexpected external event such as the Arab oil boycott [which] might skew this measurement." 537 F.2d at 1375 (86a).

Such a requirement means that, despite the fact that a private antitrust claimant never suffered a net loss due to the alleged violation, it may satisfy the requirement of section 4 of the Clayton Act merely because the antitrust defendant cannot account for events such as the Arab boycott.

Neither this Court, in *Hanover Shoe,* nor any other court, has, however, imposed such insuperable burdens to the establishment of the defense. Indeed, the attachment of those burdens by the Fifth Circuit squarely conflicts with the other post-*Hanover Shoe* cases addressing this issue. As the court in *Philadelphia Housing Authority* v. *American Radiator and Standard San. Corp.,* 323 F.Supp. 364, 375 (E.D. Pa. 1970), noted: "At least three courts ... have

recognized that such a [passing-on] defense presents an obstacle to plaintiffs in a treble damage action who are somewhere in the middle of a chain of distribution and who therefore must prove that an overcharge was passed on to them but not by them."

Not only are the additional prerequisites attached by the Fifth Circuit contrary to existing law, they are also unwarranted. No court or jury could consider fully the imponderables of events such as the Arab boycott; no defendant could account for such imponderable elements. By requiring proof of the *absence* of their effect, the Fifth Circuit has demolished the defense, notwithstanding the express caveat of this Court in *Hanover Shoe* that the defense remains.

Nor has this Court or any other court held that a pre-existing cost-plus contract is the only situation in which a passing-on defense may be made. Rather, as noted, this Court in *Hanover Shoe* characterized a pre-existing cost-plus contract as illustrative of situations where no injury in fact would be apparent.

And, insofar as the Fifth Circuit held that for the passing-on defense to have validity, the arrangement must pre-exist and antedate the violation, that holding squarely conflicts with *Obron* v. *Union Camp Corp.*, 477 F.2d 542 (6th Cir. 1973), and *National Auto Brokers Corp.* v. *General Motors Corp.*, 376 F.Supp. 620 (S.D.N.Y. 1974). In neither of those cases did the arrangement exist prior to the violation. Yet the court, in each case, rejected a claim of injury-in-fact because the overcharge had no effect on the profits of the plaintiff. Unlike the Fifth Circuit, they were willing to examine the issue rather than presume an injury. Had the Fifth Circuit followed the teaching of these cases, respondents' claims would have been dismissed. Certiorari should be granted to review the Fifth Circuit's preclusion of the passing-on defense.

CONCLUSION

WHEREFORE, Yoder prays that a writ of certiorari issue to review the judgment of the court below and that on such review the court below be instructed to dismiss the antitrust counterclaims for failure to show a legally cognizable economic injury to the respondents.

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